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Nos. 00-596 & 00-597

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LORILLARD TOBACCO COMPANY, *et al.*,
Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,
Respondent.

ALTADIS U.S.A. INC., *et al.*,
Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, U.S. CONFERENCE OF MAYORS, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL MUNICIPAL LAWYERS ASSSOCIATION, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether Massachusetts' location regulations applicable to tobacco advertising are preempted by FCLAA Section 5(b).

2. Whether Massachusetts' regulation of the location of tobacco advertising and the retail placement of tobacco products violates the First Amendment.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.[1] This case presents two issues of recurring importance to *amici* and their members: 1) whether federal law preempts the States' police powers, and 2) the scope of state authority to regulate commercial speech.

Petitioners argue that the Federal Cigarette Labeling and Advertising Act (FCLAA) expressly preempts Massachusetts' regulations concerning the location of cigarette advertising, which were adopted to reduce the incidence of illegal sales of tobacco products to minors. Petitioners construe FCLAA's express preemption provision, 15 U.S.C. § 1334(b), as providing a broad immunity from state regulation of cigarette advertising. If petitioners' position is upheld, a significant and highly deleterious encroachment on the States' police powers would result.

Petitioners also argue that Massachusetts' regulations, including its rule that tobacco products be accessible only to store personnel, violate the First Amendment. Petitioners go as far as to urge the Court to overrule longstanding commercial speech doctrine and impose "strict scrutiny" to state and local government regulations of commercial speech, except when the government regulates to protect fairness in the bargaining process. This Court, however, like *amici*, has long recognized that commercial speech can impose social and economic costs that extend well beyond the consequences of fraudulent and deceptive advertising. The Court's

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[1] The parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.3, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

commercial speech doctrine represents an appropriate accommodation of First Amendment values and the government's interests. The Court should reject petitioners' entreaties to change it.

Because of the importance of these issues to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

1. FCLAA's express preemption provision, 15 U.S.C. § 1334(b), does not preempt Massachusetts' regulations of the location of cigarette signs and in-store advertising. Contrary to petitioners' assertions, § 5(b) does not preempt all state "requirement[s] or prohibition[s] . . . with respect to the advertising of cigarettes" labeled in conformity with FCLAA. *Id.* 15. It preempts only those advertising requirements or prohibitions that are "based on smoking and health." *Id.*

The Court has recognized that the language of § 5(b) is susceptible to multiple interpretations. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 528-30 & nn 26-27 (1992). In such instances, the Court's interpretation of an express preemption provision "is informed by two presumptions about the nature of preemption." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). The first is the presumption against preemption of the States' police power. *Id.* The second is that "any understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of *congressional purpose*.'" *Id.* at 485-86 (quoting 505 U.S. at 530 n.27).

Petitioners offer no explanation as to what the critical phrase—"based on smoking and health"—means. Their failure to do so is fatal because the express purpose of the State's regulations "is to eliminate deception and unfairness" in the marketing of cigarettes and "to address the incidence of cigarette smoking . . . by children under legal age." 940

CMR § 21.01 (reprinted at Pet. App. 105a). The regulations' substantive provisions likewise make no reference to health concerns. *See id.* §§ 21.02 - 07 as amended (reprinted at Pet. App. 105a-114a).

The unstated premise of petitioners' position is that *any* regulation of cigarette advertising that has the purpose of reducing consumption is "based on smoking and health" and is thus preempted. Construing section 5(b) at this level of generality would, however, lead to numerous absurd results and render the foregoing statutory language superfluous. The Court must therefore go beyond the ambiguous text and construe the statute in light of the presumption against preemption of state authority and with "a fair understanding of congressional purpose." *Medtronic*, 518 U.S. at 485-86 (citations omitted).

FCLAA's statement of purpose clarifies that Congress' goal was not to protect the tobacco industry from all nonuniform and confusing cigarette labeling and advertising regulations, but only those "cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15 U.S.C. § 1331(2)(B). And Congress further stated that its purpose was to protect the "national economy . . . to the maximum extent *consistent with* this declared policy." *Id.* § 1331(2)(A) (emphasis added). Location restrictions do not impose a "requirement or prohibition based on smoking and health," *id.* § 1334(b), as they plainly do not involve "advertising with respect to any relationship between smoking and health." *Id.* § 1331. Whatever the precise scope of § 5(b) preemption, the provision's ambiguous language cannot be read as providing a clear and manifest expression of Congress' intent to preempt Massachusetts' regulations of the location of tobacco advertising.

2. Petitioners and their *amici* urge this Court to overrule *Central Hudson* and to apply strict scrutiny to state laws regulating any commercial speech that proposes a lawful

transaction in a truthful, non-misleading way, including their own message: buy tobacco. Petitioners' First Amendment argument should be rejected.

A. Petitioners' request that the tests for the validity of regulation of political speech and commercial speech be conjoined is ill advised and unnecessary. It overlooks the distinct rationale, reflected in this Court's cases, for providing marginally less protection for commercial speech than for political speech. The First Amendment provides maximum protection for political speech because it is integral to the political process. In analyzing commercial speech, by contrast, the Court has repeatedly recognized the substantial government interests advanced by the regulation of commercial speech. These include not only preventing unlawful activity and ensuring the fairness of the bargaining process, as petitioners acknowledge, but also protecting such individual interests as privacy and safety, and limiting the social and economic costs of certain activities to the citizenry as a whole.

B. Nor are *Central Hudson* and its progeny inadequate to maintain the balance between protection for commercial speech and the States' need to regulate in the public interest. This Court's post-*Central Hudson* cases have clarified and enhanced the protections that the First Amendment affords commercial speech, all within the analytical framework created by that landmark ruling. The Court has accomplished this principally by amplifying the evidentiary burden that state and local governments must meet when regulating truthful speech proposing lawful transactions. Under current commercial speech doctrine, a State that seeks to regulate commercial speech "must demonstrate that the harms it recites" in support of the regulation "are real[,] . . . that its restriction will in fact alleviate them to a material degree," *Edenfield v. Fane*, 507 U.S. 761, 771 (1993), and that the regulations are reasonably tailored to their objectives. *See*

Board of Trustees of State Univ. of N. Y. v. Fox, 492 U.S. 469, 476-77 (1989).

C. When reviewed under the Court's analytical framework for commercial speech, it is clear that Massachusetts' tobacco regulations are constitutional. Not only is smoking highly detrimental to children and adolescents in a variety of ways, but Massachusetts makes it a crime to sell tobacco to minors. Mass. Gen. Laws ch. 270, § 6. As the courts below found, Massachusetts has shown that the challenged regulations alleviate these real harms to a material degree, and are no more restrictive than this Court's case law permits. The judgment of the court of appeals should accordingly be affirmed.

ARGUMENT

Petitioners challenge a number of regulations adopted by the Attorney General of Massachusetts to regulate the placement of tobacco advertising. Promulgated as part of the State's comprehensive scheme to reduce the incidence of minors' smoking, the regulations address both the demand and supply sides of this important problem. At issue are "[a]dvertising restrictions," which prohibit advertising tobacco products "within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school," 940 CMR § 21.04(5)(a); *see also id.* § 22.06(5), and require that "point-of-sale advertising" of tobacco products may not be "placed lower than five feet from the floor." *Id.* §§ 21.04(5)(b) & 22.06(5)(b). Petitioners also challenge the State's "retail outlet sales practices" rule, which prohibits the use of "self-service displays" and requires that retailers place tobacco products "out of the reach of all consumers, and in a location accessible only to outlet personnel." *Id.* §§ 21.04(2)(c) & (d); 22.06(2)(c) & (d).

The court of appeals correctly held that FCLAA § 5(b), 15 U.S.C. § 1334(b), does not expressly preempt the

Massachusetts Attorney General's regulations of the location of tobacco advertising and the in-store advertising and display of tobacco products. As explained below, Section 5(b) does not preempt all state "requirement[s] or prohibition[s] . . . with respect to the advertising" of cigarettes "labeled in conformity with" FCLAA. 15 U.S.C. § 1334(b); *see* Pet. Lorillard Br. 10-11; 13-24. Rather, it preempts only those requirements or prohibitions that are "based on smoking and health." *Id.* § 1344(b). None of the challenged regulations, which deal only with the placement of advertising, are based on smoking and health. They are therefore not preempted.

The court of appeals likewise correctly ruled that the State's regulations do not violate the First Amendment. Contrary to petitioners' contention, distinct legal standards apply to political and commercial speech because of the constitutional values served by these different kinds of speech. While petitioners would apply "strict scrutiny" to all non-misleading advertising about "lawful" products, the result would be to overturn more than two decades of this Court's precedents that provide government with essential power to regulate commercial speech when absolutely necessary to serve the public interest. Massachusetts has "demonstrate[d] that the harms it recites are real and that its restriction[s] will in fact alleviate them to a material degree," Pet. App. 19a (citation omitted), and that they are no more restrictive than this Court's cases permit. The judgment of the court of appeals should accordingly be affirmed.

I. FCLAA SECTION 5(b) DOES NOT PREEMPT MASSACHUSETTS' LOCATION RESTRICTIONS ON CIGARETTE ADVERTISING

Under the Supremacy Clause of the Constitution, "[w]here a state statute conflicts with, or frustrates, federal law, the former must give way." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663 (1993). While preemption can be either express or implied, "[w]hen Congress has considered the

issue of pre-emption and has included in the . . . legislation a provision explicitly addressing that issue . . . there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation." *Cipollone*, 505 U.S. at 517 (internal quotation and citation omitted).

Where a "statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX*, 507 U.S. at 664; *Medtronic*, 518 U.S. at 484. *See also Cipollone*, 505 U.S. at 517. The Court "must give effect" to the plain meaning of a statute in the absence of "good reason to believe Congress intended" otherwise. *Id.* at 521 (internal quotation and citation omitted). Where, as here, however, an express preemption provision is susceptible to multiple interpretations, the Court's "interpretation is informed by two presumptions about the nature of pre-emption." *Medtronic*, 518 U.S. at 485.

The first presumption recognizes that "the States are independent sovereigns in our federal system," which exercise broad police power that Congress is reluctant to displace. *Id.* Thus, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' " the Court " 'start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). This presumption is fully operative here, as the States have long exercised their police power to regulate the location of billboard advertising, *see, e.g., St. Louis Poster Advert. Co. v. City of St. Louis*, 249 U.S. 269, 274 (1919); *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526-31 (1917), and this Court has upheld a state prohibition of tobacco advertising on billboards and placards. *See Packer Corp. v. Utah*, 285 U.S. 105, 108-11 (1932); *see also* Utah

Code § 76-10-102 (2001) (misdemeanor to display tobacco advertising on "any billboard, streetcar sign, streetcar, bus, [or] placard," except on sign in front of retail outlet).

The second presumption is that the Court's "analysis of the scope of the statute's pre-emption is guided by our oft-repeated comment . . . that '[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case." *Medtronic*, 518 U.S. at 485 (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)); *see also Cipollone*, 505 U.S. at 516. The Court has thus explained that "any understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of *congressional purpose*.' " *Medtronic*, 518 U.S. at 485-86 (quoting *Cipollone*, 505 U.S. at 530 n.27) (opinion of Stevens, J.). While this understanding "primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it," *id.* at 486 (quoting *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment), "the 'structure and purpose of the statute as a whole'" is "also relevant." *Id.* (quoting *Gade*, 505 U.S. at 98 (opinion of O'Connor, J.)). Through the use of all of these tools of statutory construction, the Court seeks a "reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Medtronic*, 518 U.S. at 486.

The application of these principles to FCLAA compels the conclusion that Section 5(b) does not preempt Massachusetts' regulations. Section 5(b) provides:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. §1334(b). As the Court has previously held, "the pre-emptive scope of the [FCLAA] is governed entirely by the express language in § 5." *Cipollone*, 505 U.S. at 517.

In *Cipollone*, the Court acknowledged that Section 5(b) was "obviously broader" than the pre-emption provision of the 1965 act. *Id.* at 523. But after concluding that "[t]he phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law" claims, the Court recognized that that "does not mean that [Section 5(b)] pre-empts all common law claims." *Id.* at 521, 523. The Court then described the pre-emption inquiry in the following terms:

> [W]e must fairly but—in light of the strong presumption against pre-emption—narrowly construe the precise language of § 5(b) and we must look to each of petitioner's common-law claims to determine whether it is in fact pre-empted. The central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common-law damages action constitutes *a "requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion,"* giving that clause a fair but narrow reading. As discussed below, *each phrase within that clause limits the universe of common-law claims pre-empted by the statute.*

Id. at 523-24 (emphasis added).

Relying principally on the Second Circuit's decision in *Greater New York Metro. Food Council v. Giuliani*, 195 F.3d 100 (2d Cir. 1999), *cert. denied*, 529 U.S. 1066 (2000), the court of appeals held that Section 5(b) does not preempt Massachusetts' regulations. The court reasoned that the State's regulations impose "location restrictions" analogous to zoning restrictions, which "do not interfere with the cigarette and smokeless tobacco labeling and advertising scheme established by Congress" and do not "present the kind of 'diverse, nonuniform, and confusing' advertising standards with which Congress was concerned when it enacted the FCLAA." Pet. App. 12a-13a (quoting 15 U.S.C. § 1331).

Petitioners criticize the court of appeals' construction of the phrase "with respect to . . . advertising" as irreconcilable "with the statutory text," Pet. Lorillard Br. 15, accusing the court of "liberat[ing] itself from the confines of the text," *id.* at 17, and of "effectively rewrit[ing] the statute, adding terms that Congress did not see fit to include." *Id.* at 19. Petitioners, however, are guilty of similar, if not the same, sins. Indeed, even if petitioners are correct in their contention that the First Circuit erred in its construction of this statutory phrase, Section 5(b) still does not preempt the State's regulations. To paraphrase *Cipollone,* "each phrase within [Section 5(b)] limits the universe of [state law] pre-empted by the statute." 505 U.S. at 524.

The relevant phrase of Section 5(b), which precludes preemption in this case, is the limitation that a state requirement or prohibition "be based on smoking and health." 15 U.S.C. § 1334(b). While petitioners assert that the State's location restrictions are "based on smoking and health," Pet. Lorillard Br. 14 (citing Pet. App. 13a n.6), they offer no explanation as to what this critical phrase means. Their failure is fatal, because Massachusetts' regulations applicable to cigarettes make no reference to "smoking and health." To the contrary, the regulations expressly declare that their purpose "is to eliminate deception and unfairness in the way cigarettes and smokeless tobacco products are marketed, sold, and distributed in Massachusetts in order to address the incidence of cigarette smoking and smokeless tobacco use by children under legal age." 940 CMR § 21.01 (reprinted at Pet. App. 105a). The substantive provisions of the regulations likewise make no reference to health concerns. *See id.* §§ 21.02 - 07 as amended (reprinted at Pet. App. 105a-114a).

The unstated premise of petitioners' position is that *any* regulation of cigarette advertising—even if directed at illegal consumption—which has the purpose of reducing consumption, is "based on smoking and health" and is thus preempted. Construing section 5(b) at this level of generality would,

however, lead to numerous absurd results. Most sports stadiums and arenas are owned by state and local authorities. Under petitioners' construction, a State or local government would be prevented from prohibiting cigarette advertising within its facility. Moreover, the state and local entities that operate airports, train and bus stations, subways, trolleys and bus lines, would be prohibited from banning cigarette advertising therein. *See, e.g.*, Utah Code § 76-10-102 (2001).

It is no answer to suggest that these examples are "counterfactual" because they were covered by the Master Settlement Agreement (MSA) and consent decree. *See* Pet. Lorillard Br. 23 (describing as "counterfactual" the court of appeals' hypothetical that petitioners' construction of section 5(b) "could lead to the conclusion that 'states [are] without power to prohibit a cigarette company from handing out free cigarettes in an elementary school yard,'" Pet. App. 10a (citation omitted), because petitioners have agreed to refrain from "'target[ing] Youth.'") (other citation omitted)).[2] That

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[2] It is unclear why petitioners' acceding to an injunction to refrain from targeting minors renders a prohibition on providing free samples to minors "counterfactual." By its terms the injunction applies only to "Participating Manufacturers in their corporate capacity." J.A. 273. The decree goes on to state that "[t]he remedies, penalties and sanctions that may be imposed . . . in connection with a violation of this Consent Decree and Final Judgment . . . only apply to the Participating Manufacturers, and shall not be imposed or assessed against any employee, officer, or director of any Participating Manufacturer, or against any other person or entity as a consequence of such violation. . . ." *Id.* at 274.

In contrast, the State's prohibition on the distribution of free samples applies not only to a "manufacturer," but also to a "distributor or retailer." 940 CMR § 21.04(1)(a). And the regulations state that the terms "distributor" and "retailer" include "any person" who engages in the defined activity. *Id.* § 21.03. The regulations thus prescribe conduct by a far greater universe of entities and individuals than petitioners in their corporate capacity. While petitioners may faithfully refrain from such conduct in the future, the terms of section 5(b) preempt a state "requirement or prohibition" without regard to the status of the party upon

petitioners agreed in the MSA—thirty years after the enactment of the FCLAA—to forgo certain practices in advertising and promoting cigarettes has no probative value in divining Congress' intent in enacting section 5(b).

Furthermore, cigarette manufacturing and marketing is a huge international business. While petitioners dominate the U.S. market, they are not the only companies engaged in the business. *See generally* DMG World Media, *World Tobacco Directory* 10 - 111; 116 - 128 (48th ed. 2000). Massachusetts could adopt its scheme to regulate those companies who have not signed the MSA, particularly those new entrants into the market, who have not previously engaged in the conduct which gave rise to the State's lawsuit and who are thus not encumbered with the monetary payments which petitioners have agreed to make and who would have additional funds to market their products. *See* Pet. Lorillard Br. 3. Indeed, petitioners themselves recognized the problem posed by non-participating manufacturers and negotiated in the MSA a provision limiting their financial obligations in the event of a loss of market share. *See* MSA art. IX(d)(1); Tobacco Control Resource Center, *The Multistate Master Settlement Agreement And The Future Of State And Local Tobacco Control: An Analysis of Selected Topics and Provisions of the Multistate Master Settlement Agreement of November 23, 1998* 32 (1999) (discussing MSA art. IX(d)).

As these examples demonstrate, petitioners' proposed reading of the statute would lead to absurd results. *See, e.g., United States v. X-Citement Video*, 513 U.S. 64, 69-70 (1994). Furthermore, petitioners' premise that any regulation of cigarette promotion enacted for the purpose of reducing

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whom it is imposed. 15 U.S.C. § 1334(b). The hypothetical is thus not a "straw man," Pet. Lorillard Br. 23, and the court of appeals was correct to recognize the potential consequences of adopting petitioners' interpretation of section 5(b).

smoking is *necessarily* "based on smoking and health," renders that phrase superfluous. *Cf. Hohn v. United States*, 524 U.S. 236, 249 (1998). Simply put, if Congress had intended to provide petitioners with the broad immunity from state regulation that they claim the statute provides, then Congress had no need to include the phrase "based on smoking and health" in Section 5(b). Congress could have simply provided that "No requirement or prohibition shall be imposed under State law with respect to the advertising or promotion of any cigarettes" labeled in conformity with the act. Congress, however, did not do so and the Court must "give effect, if possible, to every clause and word" of Section 5(b). *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotations and citations omitted).

As the *Cipollone* plurality recognized, the phrase "based on smoking and health" has no plain meaning. *See* 505 U.S. at 528-30 & nn. 26-27.[3] The Court must therefore go beyond the ambiguous text and construe it in light of the presumption against preemption of state authority and with " 'a fair understanding of *congressional* purpose.'" *Medtronic*, 518 U.S. at 486 (quoting *Cipollone*, 505 U.S. at 530 n.27).

Section 1331, FCLAA's statement of purpose, could not make it clearer that section 5(b) does not preempt Massachusetts' location restrictions. As the provision explains, Congress' purpose was:

> to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby . . . the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion

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[3] The three-way debate in *Cipollone* between the plurality and the two dissenting opinions centered on the level of generality to be used in construing the phrase "based on smoking and health." *See* 505 U.S. at 529 n.27. That debate reinforces the conclusion that the phrase has no plain meaning.

> of warning notices on each package of cigarettes and in each advertisement of cigarettes[.]

15 U.S.C. § 1331. To be sure, the *Cipollone* plurality described the FCLAA's purpose as "protecting the national economy from the burden imposed by diverse, nonuniform, and confusing cigarette labeling and advertising regulations." *Cipollone*, 505 U.S. at 514 (*quoted in* Pet. Lorillard Br. 21). But Section 1331(2)(B) clarifies that Congress' purpose was confined to protecting the tobacco industry not from all such regulations, but only those "cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15 U.S.C. § 1331(2)(B). And Congress further stated that its purpose was to protect the "national economy . . . to the maximum extent consistent with this declared policy." *Id.* § 1331(2)(A) (emphasis added). The scope of Congress' purpose in enacting FCLAA conclusively establishes that Section 5(b) does not preempt Massachusetts' location restrictions.

Such location restrictions do not impose a "requirement or prohibition based on smoking and health," *id.* § 1334(b), as they plainly do not involve "advertising with respect to any relationship between smoking and health." *Id.* § 1331. The regulations do not require any statement in cigarette advertising "about any adverse health effects of cigarette smoking." *Id.* § 1331(1).[4] Nor do they prohibit petitioners from making any statement in cigarette advertising "with respect to any relationship between smoking and health." *Id.* § 1331(2)(B). Moreover, the regulations do not require the disclosure in advertising or promotion of health-related information such as a brand's yield of tar, nicotine, carbon monoxide, hydrogen cyanide, or nitrosamines, or even of the ingredients added in the manufacturing of a cigarette, many of which may be toxic or form carcinogens when subjected to

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[4] Such a requirement would be preempted by Section 5(a), 15 U.S.C. § 1334(a).

heat and burning. *See* U.S. Dept. of Health & Human Services, *Reducing Tobacco Use: A Report of the Surgeon General* 178-82 (2000). Nor do the regulations prohibit the tobacco industry from touting their brands as "lights" or having "lowered tar & nicotine." *See Parade*, Mar. 11, 2001, at 3 (ad for Pall Mall Lights); *Vanity Fair*, Jan. 2001, at 179 (ad for Marlboro Lights).

Thus, contrary to petitioners' view, construing Section 5(b) to support a content/location distinction is consistent with giving the operative phrase, "based on smoking and health," a "fair but narrow reading." *Cipollone*, 505 U.S. at 524. Whatever the precise scope of Section 5(b) preemption is, the provision's ambiguous language cannot be read—especially in light of Congress' declaration of purpose and the presumption against preemption of the States' police powers, *see Packer*, 285 U.S. at 111—as providing a "clear and manifest" expression of Congress's intent to preempt Massachusetts' location restrictions. *Rice*, 331 U.S. at 230.

II. MASSACHUSETTS' REGULATION OF THE LOCATION OF TOBACCO ADVERTISING AND THE RETAIL PLACEMENT OF TOBACCO PRODUCTS DOES NOT VIOLATE THE FIRST AMENDMENT

Petitioners argue that notwithstanding *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980) and its progeny, Massachusetts' regulations should be subject to strict scrutiny. *See, e.g.*, Pet. Lorillard Br. 26. The Court should reject this argument for two reasons. First, it would unduly limit the States' authority in a manner contrary to this Court's cases. Second, it it unnecessary in view of the recent amplification by the Court of the evidentiary burden a State must meet in order to regulate commercial speech.

A. The Fundamental Distinction Between The Strict Scrutiny Applied To Political Speech And The Marginally Lesser Protection Afforded To Commercial Speech Reflects Core Constitutional Values And Should Not Be Effaced

Petitioners contend that "[w]here the government engages in content-based regulation of commercial speech 'for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.' " Pet. Lorillard Br. 28 (quoting *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (plurality opinion)). According to petitioners, "the government has greater power to regulate the content of commercial speech only when it 'regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information.' " *Id.* at 29 (quoting *44 Liquormart*, 517 U.S. at 501 (plurality opinion)). Petitioners request that the Court "clarify that *Central Hudson*'s 'intermediate scrutiny' standard applies only when the government regulates advertising based on those particular commercial aspects of the speech that justify affording lesser constitutional protection to commercial speech in the first place." *Id.* at 34.

The Court should reject petitioners' entreaties to subject regulation of commercial speech, like regulation of political speech and public discourse, to strict scrutiny. The rationale for providing greater constitutional protection for political, as opposed to commercial, speech is clear: political speech is constitutionally more significant than commercial speech. *See Glickman v. Wileman Brothers & Elliot, Inc.*, 521 U.S. 457, 469-72 & nn. 13-14 (1997) (compelling political speech affects fundamental First Amendment values that are not implicated by compelling commercial messages to buy

particular products); Robert Post, *The Constitutional Status Of Commercial Speech*, 48 U.C.L.A. L. Rev. 1, 47-50 (2000). This is because these two types of speech serve different constitutional values. On the one hand, the First Amendment values political speech because it is part of the political process. On the other hand, the First Amendment values commercial speech because it provides information that may be relevant to participation in the political process.[5] *See* Post, 48 U.C.L.A. L. Rev. at 48-49.

It is well settled that the level of constitutional protection turns on the constitutional significance of the speech that is regulated.[6] *See, e.g., City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (plurality opinion) (nude dancing "falls only within the outer ambit of the First Amendment's protection") (collecting cases). Thus, when speech does not involve participation in the political process but serves instead the function of providing commercial information, the *Central Hudson* test—a level of constitutional scrutiny only marginally lower than strict scrutiny, *see* pp. 20-23, *infra*—embodies an appropriate accommodation between the States' responsibility and power to promote public safety, morals,

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[5] The tobacco companies' arguments that the Court should apply strict scrutiny to the Massachusetts regulations because they are content-based and viewpoint-discriminatory ignore the fundamental distinction between the constitutional values served by political speech and commercial speech. *See* Pet. Lorillard Br. 26-38, 39-41. Although the Massachusetts regulations restrict advertisements promoting tobacco use and do not restrict advertisements discouraging tobacco use, there is no reason for the Commonwealth to undercut its own police power objectives by prohibiting private anti-smoking advertisements.

[6] For example, government interests in managing the speech of its employees do not change simply because the employee is addressing a matter of public as opposed to private concern, but "constitutional protections for employee speech do change, because speech about matters of public concern embodies a distinct and greater constitutional value." Post, 48 U.C.L.A. L. Rev. at 48 (citing *Connick v. Myers*, 461 U.S. 138, 145-54 (1983)).

and general welfare and the constitutionally protected right to engage in commercial speech. This marginally lower level of scrutiny is appropriate not only, as the tobacco companies and their *amici* concede, to accommodate the States' interests in preventing fraudulent and misleading communications. *See* Pet. Lorillard Br. 28-29. It is appropriate to accommodate other equally important interests, such as Massachusetts' interest in curtailing illegal underage tobacco use.

The core premise of petitioners' argument is that the Court's commercial speech doctrine exists solely to protect the efficiency and fairness of the market. *See id.* at 28-29. While protecting market efficiency may be a worthy goal that has been viewed approvingly by some members of the Court, "the First Amendment should no more be interpreted to incorporate Milton Friedman than the Fourteenth Amendment should be read to incorporate Herbert Spencer." Post, 48 U.C.L.A. L. Rev. at 45-46; *cf. College Sav. Bank v. Florida Prepaid Postsec. Ed. Exp. Bd.*, 527 U.S. 666, 691 (1999). Nor is the Court's commercial speech doctrine limited in the manner petitioners contend.

The Court has repeatedly upheld regulation of commercial speech when the State has asserted purposes other than protecting fairness in the bargaining process. *See, e.g., Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 624-35 (1995) (upholding ban on mail solicitation by attorney of accident victims). In *Florida Bar*, the Court upheld the regulation based on the State's assertion of a substantial interest in protecting victims' privacy and the bar's reputation. The Court expressly noted that it did not even consider the State's interest "in protecting people against undue influence and overreaching" as a basis for upholding the state laws as a valid regulation of commercial speech. *Id.* at 624 n.1.

In *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 484-85 (1995), the Court noted that "the prevention of misleading statements of alcohol content need not be the exclusive government interest served by" a statute; "the Government

here has a significant interest in protecting the health, safety, and welfare of its citizens by preventing brewers from competing on the basis of alcohol strength, which could lead to greater alcoholism and its attendant social costs." *Coors* thus supports the proposition that commercial speech can be regulated "for reasons unrelated to the preservation of a fair bargaining process." Pet. Lorillard Br. 28 (internal quotations and citations omitted). *See also Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 475 (1989) (ban on commercial speech was supported by State's interest in "promoting an educational rather than commercial atmosphere on SUNY's campuses, promoting safety and security, preventing commercial exploitation of students, and preserving residential tranquility").

In *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328 (1986), the Court upheld Puerto Rico's ban on casino advertising targeted at the Commonwealth's residents, notwithstanding that it "concern[ed] a lawful activity and [was] not misleading or fraudulent." *Id.* at 340-41. The Court expressly recognized Puerto Rico's substantial interest in reducing gambling by its residents because "excessive casino gambling among local residents . . . would produce serious harmful effects on the health, safety, and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime." *Id.* at 341 (citation omitted). The law at issue in *Posadas* thus had nothing to do with protecting the fairness of the bargaining process. Rather, its stated purpose was to protect Commonwealth residents from the social and economic costs of the underlying commercial activity.[7]

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[7] In *Coors* the Court approvingly cited this portion of *Posadas* for the proposition that government can regulate commercial speech in order to

As the forgoing cases demonstrate, petitioners' contention that "intermediate scrutiny" should be limited to cases in which the government is regulating to protect the bargaining process is insupportable. It would require the overruling of numerous decisions recognizing that commercial speech can impose substantial social and economic costs and that the States have authority to reduce those costs by appropriate regulation of commercial speech. And while petitioners downplay the broader purposes of their request—disingenuously suggesting that the Court need only "clarify" its prior holdings—applying strict scrutiny to laws that regulate tobacco advertising could result in the invalidation of the Federal ban on broadcast advertising of cigarette products. *See* 15 U.S.C. § 1335. The Court should decline to open the gates of its commercial speech doctrine to petitioners' jurisprudential Trojan horse.

B. The "Real Harm" Component Of The *Central Hudson* Test Is An Effective Safeguard of Commercial Speech

The Court has "never accepted mere conjecture" by government "as adequate to carry a First Amendment burden." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392 (2000). *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 822 (2000) (when government regulates speech to protect children from exposure to indecent materials it "must present more than anecdote and supposition"). When regulating commercial speech, a state or local government must " 'demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' " *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999) (quoting *Edenfield*, 507 U.S. at 770-71); *see also United States v.*

"protect[ ] the health, safety, and welfare of its citizens." 514 U.S. at 485 (citing *Posadas*, 478 U.S. at 341).

National Treasury Employees Union, 513 U.S. 454, 475 (1995) (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994) (*Turner I*)).

This "real harm" standard is an essential and effective guarantee of free speech in both the commercial and non-commercial contexts. In both situations the "real harm" requirement ensures that the government is not at liberty to enact "bans [that] . . . serve only to obscure an 'underlying governmental policy' that could be implemented without regulating speech." *44 Liquormart*, 517 U.S. at 503 (plurality opinion) (quoting *Central Hudson*, 447 U.S. at 566 n.9).

In its commercial speech cases since *Edenfield*, the Court has consistently held that government cannot carry its burden of justifying a restriction on commercial speech "by mere speculation or conjecture." 507 U.S. at 770. *See also Greater New Orleans Broadcasting*, 527 U.S. at 188; *Coors*, 514 U.S. at 487; *Ibanez v. Florida Dept. of Bus. & Prof. Reg.*, 512 U.S. 136, 143 (1994); *see also 44 Liquormart*, 517 U.S. at 507 (plurality opinion).

In *Edenfield*, for example, the Court held that a state board's ban on in-person solicitation by certified public accountants violated the First Amendment where the only evidence of harm was an affidavit "contain[ing] nothing more than a series of conclusory statements." 507 U.S. at 771. Similarly, in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647-49 (1985), the Court rejected a state's argument that a ban on illustrations in attorney advertisements could be justified by abstract claims that the public would be misled, manipulated, or confused. The Court found that "the State's arguments amount[ed] to little more than unsupported assertions," and that the State had failed to offer "any evidence or authority of any kind" to support its contentions. *Id.* at 648.

The "real harm" standard also played a critical role in two recent decisions addressing the "must-carry" provisions of a

federal cable TV statute. *See Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*); *Turner I*, 512 U.S. 622. In *Turner I*, the Court held that the "must-carry" provisions were subject to intermediate scrutiny under the First Amendment. *Turner I*, 512 U.S. at 662. A plurality determined that the government must accordingly "demonstrate" that the harms that the statute recited were "real, not merely conjectural" and that the regulation would "in fact alleviate these harms in a direct and material way." *Id.* at 664.

After a remand to develop the record, a majority held that the must-carry provisions did not violate the First Amendment. *Turner II*, 520 U.S. at 185. All nine Justices agreed the federal government, under an intermediate standard of review, had a duty to demonstrate both that the must-carry provisions addressed a "real harm" and that the regulations would alleviate those harms in a material way. *Compare id.* at 195 ("[t]he expanded record now permits us to consider whether the must-carry provisions were designed to address a real harm, and whether those provisions will alleviate it in a material way") *with id.* at 258 (O'Connor, J., dissenting) ("impossible to discern whether Congress was addressing a problem that is 'real, not merely conjectural,' and whether must-carry addresses the problem in a 'direct and material way' ") (*quoting Turner I*, 512 U.S. at 664 (plurality opinion)). The Court reiterated that careful review of the evidence was an essential predicate to the application of this standard. *See Turner II*, 520 U.S. at 196-221 (reviewing the evidence before Congress and the evidence developed at trial); *id.* at 236-52 (same) (O'Connor, J., dissenting).[8] *Accord NTEU*, 513 U.S. at 475.

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[8] The *Turner II* Court ultimately divided on the question whether Congress' determinations were supported by substantial evidence. This division was the result of a disagreement about the degree of deference to be accorded to Congress. On the one hand, the majority, recognizing that "courts must accord substantial deference to the predictive judgments of Congress," held that its "sole obligation is to assure that, in formulating its

As explained above, the requirement that a State "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree" is both "critical" to prevent pretextual government regulation and adequate to protect commercial speech. *See Greater New Orleans Broadcasting*, 527 U.S. at 188 (*quoting Edenfield*, 507 U.S. at 770-71; *Rubin*, 514 U.S. at 487 (internal quotation marks omitted)). At the same time, it preserves government's ability to regulate commercial speech when necessary in the public interest. The government's evidentiary obligation will, of course, vary from case to case. As the Court recently held, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon*, 528 U.S. at 391.

C. Massachusetts' Regulations Will Alleviate The Substantial Harms Of Tobacco Use By Minors To A Material Degree And Are No More Restrictive Than This Court Permits

The court of appeals correctly recognized that the "critical" inquiry under *Central Hudson* is whether the government has " 'demonstrate[d] that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' "

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judgments, Congress has drawn reasonable inferences based on substantial evidence." *Id.* at 195 (internal quotation marks and citations omitted). On the other hand, four members of the Court, while recognizing that the Court "owe[s] deference to Congress' predictive judgments," argued that the Court has "an independent duty to identify with care the Government interests supporting the scheme, to inquire into the reasonableness of congressional findings regarding its necessity, and to examine the fit between its goals and its consequences." *Id.* at 229 (O'Connor, J., dissenting). In their view, the majority had given too much deference to Congress. *Id.* at 258 (O'Connor, J., dissenting) (criticizing the majority opinion for "a willingness to substitute untested assumptions for evidence").

Pet. App. 19a (quoting *Greater New Orleans Broadcasting*, 527 U.S. at 188). Not only is it a crime in Massachusetts to sell tobacco to minors, Mass. Gen. Laws. ch. 270, § 6, the court below correctly found on a product-by-product basis (cigarettes, smokeless tobacco, and cigars) that tobacco use by minors is a real harm and that each of the Massachusetts regulations directly advances the State's interests in alleviating this harm. *Id.* at 20a-29a.[9]

As demonstrated by this Court's First Amendment jurisprudence in the analogous area of adult business regulation, Massachusetts reasonably relied on the FDA's findings in determining that tobacco use by children and adolescents is a real harm. *See generally City of Renton v. Playtime Theatres*, 475 U.S. 41, 51-52 (1986) ("The First Amendment does not require a city, before enacting . . . an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."); *see also City of Erie*, 529 U.S. at 297 (plurality opinion) ('[e]ven in cases addressing regulations that strike close to the core of First Amendment values, [the Court] ha[s] accepted a state or local government's reasonable belief that the experience of other jurisdictions is

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[9] Special First Amendment considerations apply when a State seeks "to protect children who are not yet independently able to assess the value of the [commercial] message presented." *Annheuser-Busch v. Schmoke*, 101 F.3d 325, 329 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997). *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) ("It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults."); *cf. Greater New Orleans Broadcasting*, 527 U.S. at 197 (Thomas, J., concurring) (government has less power to regulate commercial speech when "legal users" of a product are the target of the speech than when non-legal users are involved); *44 Liquormart*, 517 U.S. at 517 (Scalia, J., concurring) (regulation of commercial speech subject to higher scrutiny when government seeks to prevent "men and women" from "hearing facts that might not be good for them").

relevant to the problem it is addressing) (citing *Nixon*, 528 U.S. at 393 n.6).

In addition to the FDA's findings, the Massachusetts Attorney General had other "information to support his view that underage use of cigarettes, smokeless tobacco products, and cigars poses a real danger to the Commonwealth of Massachusetts." Pet. App. 21a; *see* J.A. 75 (FDA findings and other studies relied upon by the Attorney General). The additional evidence marshaled by the Massachusetts Attorney General offers more than adequate substantiation for the [Massachusetts] law. *See Nixon*, 528 U.S. at 393.

Just as the court of appeals correctly found that tobacco use by minors is a real harm, it also properly ruled that the Massachusetts advertising regulations "will 'directly advance' [the State's] goals of reducing both underage tobacco use and tobacco sales to minors." Pet. App. 28a. All three Massachusetts regulations reduce demand for tobacco products by minors and promote compliance with state law prohibiting tobacco sales to minors. *Id.* at 25a-29a.

The propositions that advertising promotes consumption and that restrictions on advertising will reduce consumption are "neither novel nor implausible." *Nixon*, 528 U.S. at 391. Given the Court's determination in *Nixon* that Missouri was entitled to rely on the common sense proposition that large campaign contributions cause corruption or the appearance of corruption, *see id.* at 395, the court below correctly held that Massachusetts could rely on the common sense propositions that tobacco advertising increases consumption by minors and that restrictions will reduce illegal sales to minors. Pet. App. 25a-29a. *Cf. City of Erie*, 529 U.S. at 300-01 ("it is evident that, since crime and other public health and safety problems are caused by the presence of nude dancing . . . a ban on such nude dancing would further [the city's] interest in preventing such secondary effects") (plurality opinion).

Massachusetts did not merely rely on common sense, however. As the court of appeals found, the Commonwealth "cite[d] myriad sources to support [the] proposition that tobacco advertising and tobacco use are causally related." Pet. App. 26a. Just as Missouri could rely on federal statutes and congressional findings to justify state campaign finance regulations, *Nixon*, 528 U.S. at 393, Massachusetts can rely on a federal statute prohibiting television and radio advertising of tobacco and the underlying premise that this complete prohibition of certain types of advertising will reduce consumption. *See* 15 U.S.C. §§ 1335, 4402(f) (prohibiting advertising of cigarettes, little cigars, and smokeless tobacco "on any medium of electronic communication" subject to regulation by FCC). Massachusetts, moreover, correctly relied on the FDA's express "finding that advertising plays a material role in the decision by those under 18 to use tobacco products." Pet. App. 27a (citing 60 Fed. Reg. 44466 (1996)). Thus, the Commonwealth carried its "burden of demonstrating that the restrictions will alleviate the harm caused by underage smoking to a material degree." *Id.*

The tobacco companies nonetheless claim that advertising restrictions will not directly advance the Commonwealth's interest in reducing underage tobacco use because there is no proof that the restrictions will in fact work. Pet. Lorillard Br. 43 ("[n]o study or any other evidentiary support demonstrates" that the Massachusetts regulations "will achieve an additional 'significant reduction' in underage smoking" beyond the reduction attributable to new restrictions imposed under the Master Settlement Agreement) (citation omitted); *see also id.* at 42-44. Similarly, they claim that the advertising restrictions violate the First Amendment because there are allegedly "numerous 'practical and non speech-related forms of regulation' that 'could more directly and effectively' accomplish the professed goal of reducing underage smoking." *Id.* at 45 (citation omitted).

The Court should reject petitioners' invitation to impose an insuperable empirical "evidentiary obligation" on Massachusetts. *See Nixon*, 528 U.S. at 393. Even granting the tobacco companies' assumption that the advertising restrictions in the MSA will have some effect in reducing tobacco use by minors—an assumption that runs counter to the tobacco companies' argument that there is no connection between advertising and consumption, *see* Pet. Lorillard Br. 43—Massachusetts still has a substantial governmental interest in curbing tobacco use by minors. The tobacco companies, however, would put the Commonwealth to the impossible task of proving in advance the incremental reduction in tobacco use by minors that would be attributable to its advertising restrictions.

The tobacco companies also contend that Massachusetts—before imposing any advertising restrictions—must exhaust all imaginable alternatives, such as laws licensing tobacco retailers or punishing minors for purchasing tobacco, and more vigorous enforcement of existing laws prohibiting the sale of tobacco to minors and prohibiting smoking on school grounds. *See id.* at 45. The tobacco companies, in short, would require the Commonwealth to experiment with other regulations in order to prove empirically—at immense cost to the youth of Massachusetts and extensive commercial benefit to petitioners—that the Attorney General's regulations were the least restrictive means of curbing illegal underage tobacco sales and use. Such proof is not required by this Court's commercial speech doctrine. *See Fox*, 492 U.S. at 477 (commercial speech need not be regulated by the "least restrictive means").

Petitioners' contention that Massachusetts' regulations violate the First Amendment is thus unpersuasive. The court of appeals required Massachusetts to supply at least as much empirical evidence to support its regulation of the placement of tobacco advertising as this Court required from Missouri to

justify its campaign finance regulations. *See Nixon*, 528 U.S. at 393. The First Amendment does not impose greater evidentiary burdens on a State that seeks to regulate the placement of tobacco ads and tobacco products than it does on a State that seeks to regulate political speech.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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